



California Fair Political Practices Commission

June 10, 1993

James R. Hargrove
9647 Folsom Blvd., Suite 227
Sacramento, CA 95827

Re: Your Request for Advice
Our File No. A-93-201

Dear Mr. Hargrove:

This is in response to your letter requesting advice regarding your responsibilities as a former state employee under the revolving door provisions of the Political Reform Act (the "Act").¹

Please note that this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTION

As a former supervisor at the Office of Project Development and Management in the Department of General Services, are you prohibited from bidding on a contract with the Department of Forestry to institute its capital outlay process?

CONCLUSION

You are not prohibited from applying for a contract with the Department of Forestry to institute its capital outlay process.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000 et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

FACTS

Prior to May 5, 1993, you were a designated employee in the Office of Project Development and Management in the Department of General Services ("General Services"). On May 5, 1993, you retired from that position.

The Office of Project Development in General Services is responsible for management of all major capital outlay projects (any project with a construction cost of more than \$250,000) conducted by most state agencies, including the Department of Forestry ("Forestry").

As a supervisor, your responsibilities included the development of budgetary information concerning capital outlays for the Governor's Office (including data on the Department of Forestry); development of major capital outlay project schedules; overseeing the consultant selection process and the Minority Women/Disabled Veteran Business Enterprise program for General Services; development of consultant and construction contracts and overseeing the computer system for the office. Some of these prior consulting contracts considered by General Services were contracts between the Department of Forestry and private consultants.

Recently you were contacted by a private consulting firm that offered to include you in a joint proposal on a Department of Forestry contract. The proposal concerns Forestry's establishment of its own capital outlay process. The contractor would be involved in planning, acquisition, design, construction, quality control, and maintenance.

You have asked whether the Act prohibits your involvement in the project. You stated that you have never been an employee of Forestry and that you had no involvement in the request for proposals developed by Forestry nor any of the preliminary decisions by Forestry leading up to the capital outlay program.

ANALYSIS

Revolving Door Restrictions Under the Ethics Bill

Effective January 1, 1991, the Legislature enacted a series of statutes intended to establish ethical guidelines for public officials. The Act now provides that legislators, state officeholders, and designated employees of administrative agencies are subject to new restrictions on their post-employment activity.² For designated employees of state agencies Section 87406 provides in relevant part:

² These provisions do not apply to employees of the State Legislator.

(d)(1) No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Worker's Compensation Appeals Board. The prohibition of this paragraph shall only apply to designated employees employed by a state administrative agency on or after January 7, 1991.

* * *

(e) The prohibitions contained in subdivisions (b), (c), and (d) shall not apply to any individual subject to this section who is or becomes an officer or employee of another state agency, board, or commission if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board, or commission.

You were a designated employee in the Office of Project Development and Management in the Department of General Services. Pursuant to Section 87406, for one year you may not:

1. Act as representative, agent or attorney for any person before General Services or any other administrative agency for which you have worked or represented during the 12 months before leaving office or employment;

2. For compensation;

3. For the purpose of influencing administrative action³ or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (Section 87406.)

However, this section would not prohibit such appearances before other agencies, such as Forestry, so long as you did not work for these other agencies during the 12 months before leaving office. You stated that you never worked for Forestry. Thus, this section would not impede your ability to apply for the contract with Forestry.

Traditional Revolving Door

However, even prior to the enactment of the new ethics provisions of the Act, the Act did impose a lifetime restriction on the activities of certain administrative officials under certain circumstances. Sections 87401 and 87402 provide:

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.

Section 87401.

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding

³ "Administrative action" is defined in Section 82002 as the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding.

in which the official would be prohibited from appearing under Section 87401.

Section 87402.

General Services is a "state administrative agency." (Section 87400(a).) As stated above, as a supervisor with General Services, you held a position that had decision-making authority. Thus, according to Section 87400(b) you are a "state administrative official."

As a "state administrative official," Sections 87401 and 87402 prohibit you from:

1. Representing another person;
 2. Before a court or administrative agency;
 3. For compensation;
 4. In a judicial, quasi-judicial or other proceeding;
 5. Where the proceeding is one in which you participated;
- and,
6. The state is a party or has a direct and substantial interest.

In addition, Section 87402 prohibits you from aiding, advising, counseling, consulting or assisting any other person in the proceeding.

1. Judicial, Quasi-judicial or Other Proceedings

You stated as a supervisor with the Office of Project Development and Management in General Services, you participated in a variety of matters.⁴ Thus, the restrictions of Section 87401 and Section 87402 would apply if the matters you were involved in were considered "judicial, quasi-judicial or other proceedings."

Section 87400 provides:

"Judicial, quasi-judicial or other proceeding"
means any proceeding, application, request for a

⁴ Section 87400(d) defines "participated" as "to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties."

ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.^[5]

Emphasis added.

Thus, for a proceeding to be one covered by the prohibition in Sections 87401 and 87402, the proceeding must involve a specific party or parties. For example, in the Bersinger Advice Letter (A-82-209), we advised that a state administrative official who developed a system for setting foster care rates applicable generally to group homes was not involved in a judicial, quasi-judicial or other proceedings since the official "worked on governmental matters in which there was no involvement of any specific group home."

Additionally, in the Fong Advice Letter (A-88-024) we advised that a state administrative official's participation in investigations of rate design policy and rate making schemes for the Public Utilities Commission was not participation in a "proceeding." We stated: "We base this conclusion on the fact that the rate design policy and rate making scheme for the natural gas industry had an industry-wide application and did not focus on specific utilities."

Based on this definition, it appears that many of your activities would not be considered "proceedings" since they did not involve specific parties. For example, development of data for the Governor's Office and the development of schedules and procedures which are applicable generally (rather than to specific parties) would not be considered "judicial, quasi-judicial or other proceedings."

For those other activities that did involve specific parties, such as involvement in specific contracts, Sections 87401 and 87402 would apply.⁶ However, the prohibition would not apply to

⁵ Government Code Sections 11500 et seq., sets forth state agencies subject to the Administrative Procedures Act and the procedures applicable to those agencies.

⁶ For example, as a supervisor, you were involved in overseeing the consultant selection process and the Minority Women/Disabled Veteran Business Enterprise program for General Services and the development of consultant and construction contracts. If this activity was in connection with specific contacts with specific consultants, they would be considered proceedings.

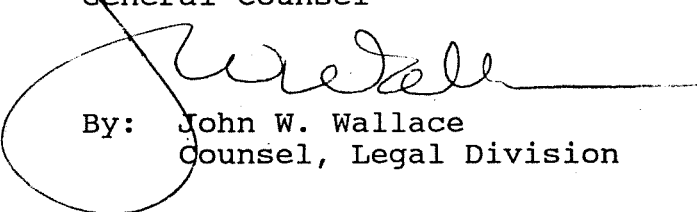
you in representing any party with regard to any other matter, including any new proceeding involving the same parties. (Sanford Advice Letter, No. A-85-182.)

You stated that the program in which you wish to participate with Forestry, while similar to programs you did participate in, is in fact a new program for Forestry. Your past involvement with Forestry, by virtue of your position with General Services was limited to other projects and contracts. Thus, the restrictions in Sections 87401 and 87402 would not appear to apply to this contract with Forestry.⁷

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.⁸

Sincerely,

Jeff Marschner
General Counsel



By: John W. Wallace
Counsel, Legal Division

⁷ We have also previously made a distinction between the drafting and award process regarding a contract and the monitoring process with respect to the same contract. (Blonien Advice Letter, No. A-89-034.)

⁸ Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.